

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HOLMES HIGH RUSTLER, LLC,

Plaintiff,

v.

MARCO A GOMEZ,

Defendant.

Case No. [15-cv-02086-JSC](#)

ORDER RE: MOTION TO DISMISS

Re: Dkt. No. 13

Plaintiff Holmes High Rustler, LLC (“Plaintiff”), owner of property at 127 Precita Avenue, San Francisco, brings this action against Defendant Marco A. Gomez (“Defendant”), the tenant and lessee of one of the units at that property. Plaintiff alleges that since 2012 Defendant has been subletting rooms in his unit to undocumented immigrants, charging them more than both his written lease and local regulations allow, and in exchange, unlawfully hiding the subtenants’ identities from Plaintiff and the authorities. (*See* Dkt. No. 12.) Plaintiff contends that Defendant’s conduct constitutes a pattern of racketeering activity in violation of the civil Racketeer Influenced and Corrupt Organizations (“RICO”) Act, 18 U.S.C. § 1962, and seeks declaratory relief in the form of an order declaring that Defendant’s conduct constitutes a material misuse of the unit and that Plaintiff is entitled to full possession of the property. Now pending before the Court is Defendant’s motion to dismiss the First Amended Complaint (“FAC”). (Dkt. No. 13.) Having carefully considered the parties submissions, and having had the benefit of oral argument on August 20, 2015, the Court GRANTS Defendant’s motion.

COMPLAINT ALLEGATIONS

Plaintiff owns two apartment buildings on a single parcel of property, including one located at 127 Precita Avenue, San Francisco, California (the “Premises”). (Dkt. No. 12 ¶ 3.)

Defendant has resided in one of the units in the Premises since 1983. (*Id.*) Plaintiff purchased the property in a bank sale on December 31, 2013. (*Id.*) In connection with that sale, Defendant averred in writing that he had a written lease, though he has not shown a copy to Plaintiff. (*Id.*)

For the last few years, Defendant has leased the Premises from Plaintiff for a monthly rent of \$1,117.32. (*Id.* ¶¶ 6-7.) Plaintiff received the monthly rent payment by mail. (*Id.* ¶ 9.) Incorporated into Plaintiff's lease are, among others, two rent control regulations, including (1) San Francisco Rent Board Ordinance Section 37.3(c), which prohibits a tenant from charging subtenants more in rent than the tenant himself currently owes the landlord, S.F. Admin. Code § 37.3(c),¹ and (2) the Residential Rent Stabilization and Arbitration Board Rules and Regulations § 6.15C(3),² which prohibits any subrental of less than the entire unit for an amount in excess of the subtenant's proportional share of the rent payable to the landlord thereof. (Dkt. No. 12 ¶ 7.) Plaintiff has been violating these rent control regulations since February 1, 2012, by subleasing bedrooms for substantially more than the amount he owes pursuant to his lease "all the while pocketing the rent illegally charged to his subtenants." (*Id.* ¶ 8.)

Plaintiff has been chosen "illegal immigrants" as his sublessees precisely because "they were unlikely to file complaints challenging [Defendant's] illegal activities." (*Id.*) The subletting practice is part of a scheme whereby Defendant promised to provide shelter and to withhold the identities of the undocumented subtenants from both the landlord and all investigating authorities in exchange for high subtenant rent payments. (*Id.*) Plaintiff has taken deliberate steps to conceal his wrongdoing, thus, many dates and times of violations are not known to Plaintiff. (*Id.*)

Plaintiff filed this action on May 7, 2015. (Dkt. No. 1.) After Defendant moved to dismiss, Plaintiff filed the instant FAC on July 6, 2015. (Dkt. Nos. 1, 13.) The FAC contains two claims. The first is a civil RICO claim, alleging that Defendant's conduct violates 18 U.S.C. § 1962(c), wrongful conduct through a "pattern of racketeering activity." (Dkt. No. 12 ¶ 12.) The

¹ See The Rent Ordinance, *available at* <http://www.sfrb.org/index.aspx?page=1240> (last visited Aug. 12, 2015).

² See City & Cnty. of San Francisco Residential Rent Stabilization & Arbitration Bd. Rules & Regulations, *available at* <http://www.sfrb.org/Modules/ShowDocument.aspx?documentid=1496> (last visited Aug. 12, 2015).

gravamen of this claim is that Defendant and his undocumented subtenants are engaged in a racketeering enterprise. (*Id.* ¶¶ 13-15.) Plaintiff alleges that their conduct violates 18 U.S.C. § 1341, mail fraud, as Defendant “transmitted by mail a portion of the proceeds received from the pattern of racketeering activity” as well as Section 274 of the Immigration and Nationality Act, 8 U.S.C. § 1324, which prohibits “harbor[ing] illegal immigrants and assist[ing] them in accomplishing their illegal entry into the United States[.]” (*Id.* ¶ 16.) Plaintiff further alleges that Defendant and the subtenants’ activities amount to “a common course of conduct intended to deceive and harm Plaintiff through the conduct of the illegal enterprise[.]” that each activity is related, has a similar purpose, participants, methods, victims, and results, and that their activity is the proximate cause of injury to Plaintiff inasmuch as it “adversely affects the stigma of the Property and Plaintiff’s ability to achieve reasonable rents for the Premises.” (*Id.* ¶ 17) As a remedy for the RICO violation, Plaintiff seeks a declaration that Defendant’s misuse of the Premises is a material violation of Defendant’s lease. (*Id.* ¶ 19.) Plaintiff brings a second claim solely for declaratory relief, seeking an order that due to that material breach of Defendant’s lease, “the Lease is terminated and that Plaintiff is entitled to be restored to full possession of the Premises vis-à-vis [Defendant] and any subtenants[.]” (*Id.* ¶ 20.)

Defendant moved to dismiss the FAC on July 14, 2015 contending that Plaintiff fails to state a claim upon which relief may be granted. The Court heard oral argument on the motion on August 20, 2015.

LEGAL STANDARD

A Rule 12(b)(6) motion challenges the sufficiency of a complaint as failing to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facial plausibility standard is not a “probability requirement” but mandates “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted). For purposes of ruling on a Rule 12(b)(6) motion, the court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the non-moving party.” *Manzarek v. St. Paul Fire & Mar. Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). “[D]ismissal may be based on

1 either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a
2 cognizable legal theory.” *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir.
3 2008) (internal quotation marks and citations omitted); *see also Neitzke v. Williams*, 490 U.S. 319,
4 326 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue
5 of law.”).

6 Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), under
7 which a party is only required to make “a short and plain statement of the claim showing that the
8 pleader is entitled to relief,” a “pleading that offers ‘labels and conclusions’ or ‘a formulaic
9 recitation of the elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678 (quoting
10 *Twombly*, 550 U.S. at 555). “[C]onclusory allegations of law and unwarranted inferences are
11 insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir.
12 2004); *see also Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (“[A]llegations in a complaint
13 or counterclaim may not simply recite the elements of a cause of action, but must contain
14 sufficient allegations of underlying facts to give fair notice and to enable the opposing party to
15 defend itself effectively.”). The court must be able to “draw the reasonable inference that the
16 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 663. “Determining whether a
17 complaint states a plausible claim for relief . . . [is] a context-specific task that requires the
18 reviewing court to draw on its judicial experience and common sense.” *Id.* at 663-64.

19 DISCUSSION

20 The civil RICO Act makes it “unlawful for any person employed by or associated with any
21 enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct
22 or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of
23 racketeering activity or collection of unlawful debt.” 18 U.S.C. § 1962(c). To state a civil RICO
24 claim, a plaintiff must allege facts showing: “(1) conduct (2) of an enterprise (3) through a pattern
25 (4) of racketeering activity (known as predicate acts) (5) causing injury to plaintiff’s business or
26 property.” *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir.
27 2005) (internal quotation marks and citation omitted). Here, Defendant appears to concede that
28 Plaintiff alleged the first and third elements—conduct and a pattern of activity. Instead, Defendant

1 contends that the FAC fails to allege facts sufficient to plausibly establish the existence of an
 2 enterprise, sufficient predicate acts, or injuries proximately caused by the enterprise's conduct.
 3 Defendant also contends that the remedy Plaintiff seeks for the inadequately pleaded civil RICO
 4 claim is unavailable as a matter of law. As the Court concludes that Plaintiff does not sufficiently
 5 plead causation or a viable remedy, it need not and does not address Defendant's other challenges.

6 1. *RICO Injury*

7 The final element of a civil RICO claim contains two components: first, the plaintiff must
 8 allege that his injury was proximately caused by the prohibited conduct; and second, the plaintiff
 9 must allege that he has suffered a harm to a specific business or property interest—a categorical
 10 inquiry typically determined by reference to state law. *Diaz v. Gates*, 420 F.3d 897, 899 (9th Cir.
 11 2005). A lack of injury to a business or property interest is not just fatal to stating a cognizable
 12 claim for relief, but defeats the RICO plaintiff's standing to sue in the first instance. *See Sedima,*
 13 *S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (a "plaintiff only has standing if, and can only
 14 recover to the extent that, he has been injured in his business or property by the conduct
 15 constituting the violation").

16 A proximate cause of injury is "a substantial factor in the sequence of responsible
 17 causation." *Oki Semiconductor Co. v. Wells Fargo Bank, N.A.*, 298 F.3d 768, 773 (9th Cir. 2002)
 18 (citation omitted). To prove that an injury is proximately caused by a RICO violation, a plaintiff
 19 must demonstrate that there is "a direct relationship between the injury asserted and the injurious
 20 conduct alleged." *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.3d 1303, 1311 (9th Cir. 1992)
 21 (citation omitted). The "proximate cause requirement not only bars RICO suits by derivative
 22 victims, or those whose injuries are 'purely contingent on the harm suffered by' direct victims, but
 23 generally precludes recovery by those whose injuries are only tenuously related to the RICO
 24 violation at issue." *Canyon Cnty. v. Syngenta Seeds, Inc.*, 519 F.3d 969, 981 (9th Cir. 2008)
 25 (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006)). To decide whether a plaintiff has
 26 adequately alleged proximate causation, courts consider "(1) whether there are more direct victims
 27 of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys
 28 general; (2) whether it will be difficult to ascertain the amount of plaintiffs' damages attribute to

defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1169 (9th Cir. 2002).

Here, Plaintiff contends that Defendant's RICO scheme "adversely affects the stigma of the Property and Plaintiff's ability to achieve reasonable rents for the Premises." (Dkt. No. 12 ¶ 17.) How so? Even if Defendant had not been operating a scheme to overcharge rent to undocumented sublessees, city rent control regulations would still prevent Plaintiff from receiving increased rental income from Defendant's unit. In other words, rent control—not to whom and for how much Defendant subleases his unit—determines what rent Plaintiff receives.

And what does "adversely affects the stigma of the Property" mean? The FAC does not explain and the Court will not speculate. For this reason alone Plaintiff has failed to sufficiently allege RICO damages. Further, for there to be a stigma which affects property values, the facts creating the stigma must be publicly known, or at least known to the market that affects the property values. Plaintiff alleges that Defendant has subleased the Premises to undocumented immigrants since February 2012; that is, at least one year before Plaintiff purchased the Premises. (Dkt. No. 12 ¶ 8.) Thus, any diminution in value because of the subleases to undocumented immigrants would have been accounted for in the price paid by Plaintiff; in other words, Plaintiff benefited from rather than suffered from the vaguely alleged stigma.

In the opposition, Plaintiff contends that stigma damages includes the possibility of a forfeiture claim by federal immigration authorities. (*See* Dkt. No. 19 at 11.) But that is not pleaded in the FAC, and the Court does not consider facts alleged for the first time in opposition to a motion to dismiss. *See Schneider v. Cal. Dep't of Corrs.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). Moreover, simply stating that there is a possibility of forfeiture proceedings is insufficient; to allege RICO injury Plaintiff would have to plead more facts to plausibly allege that there is the possibility of a forfeiture claim that affects the value of the Premises.

In sum, the FAC does not sufficiently allege that the scheme to harbor undocumented immigrants and charge them (and have them willingly pay) illegal rent proximately caused any specific injury to Plaintiff's business or property as recognized by California law. The Court need

not evaluate whether the other elements of proximate cause are sufficiently alleged. In the event Plaintiff chooses to amend the FAC, the Court notes that while “stigma” damages are cognizable under California law, *see Bartleson v. United States*, 96 F.3d 1270, 1275-76 (9th Cir. 1996) (noting that “[d]amages for diminution in property value due to stigma have been recognized by the California courts in cases of permanent nuisance” but not continuing nuisance (collecting cases)), this is only true under circumstances in which the problem cannot be corrected by injunctive relief. *See Alexander v. McKnight*, 7 Cal. App. 4th 973, 978 (1992). In other words, in determining whether stigma damages—*i.e.*, damages to compensate for the diminishing value of property—are recoverable under California law, if injunctive relief could cure the nuisance, future damages for depreciation in home value are unavailable. *Id.*; *see also Santa Fe P’ship v. ARCO Prods. Co.*, 46 Cal. App. 4th 967, 975 (1996) (“A plaintiff-landowner cannot recover damages for future or prospective harm, including damages for diminution in value, in a case where the nuisance is deemed to be continuing and abatable.”).

2. Requested Remedy

Plaintiff seeks only declaratory relief for the purported RICO violations. Specifically, Plaintiff seeks “a declaration that the misuse of the Premises . . . constitute[s] a material violation of any lease held by Defendant for the Premises.” (Dkt. No. 12 ¶ 19.) This declaration serves as the foundation for the declaratory relief sought in the second cause of action—*i.e.*, that Plaintiff is entitled to rescind the lease due to Plaintiff’s material violation and therefore restore full possession of the Premises.

Section 1964 of the RICO statute sets forth available civil remedies. Part (a) vests district courts with authority to “prevent and restrain” RICO violations “by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest . . . in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in[.]” 18 U.S.C. § 1964(a). Part (b) notes that in government-initiated RICO proceedings the court may grant temporary restraining orders or preliminary injunctive relief. *Id.* § 1964(b). Part (c) pertains to private RICO actions and provides in relevant part that

1 “[a]ny person injured in his business or property by reason of a violation of section 1962 of this
2 chapter may sue therefor in any appropriate United States district court and shall recover threefold
3 the damages he sustains and the cost of suit, including a reasonable attorney’s fee[.]” 18 U.S.C.
4 § 1964(c).

5 The Ninth Circuit has held that this statutory scheme does not permit private plaintiffs to
6 recover injunctive relief. *See Religious Tech. Cent. v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir.
7 1986), *cert. denied*, 479 U.S. 1103, (1987); *accord Or.-Laborers-Emp’rs Health & Welfare Trust*
8 *Fund v. Philip Morris Inc.*, 185 F.3d 957, 967 (9th Cir. 1999) (citation omitted). In so holding, the
9 Ninth Circuit reasoned that because “the statute provides an elaborate scheme that confers
10 authority to sue on both government officials and private citizens, it cannot be assumed that
11 Congress intended to authorize by implication judicial remedies for private citizens.”

12 *Wollersheim*, 796 F.2d at 1088. Specifically, although

13 part (c) of Section 1964 “does not expressly limit private plaintiffs
14 ‘only’ to the enumerated remedies, nor does part (a) expressly limit
15 the availability of the illustrative equitable remedies to the
16 government . . . the inclusion of a single statutory reference to
17 private plaintiffs, and the identification of a damages and fees
remedy for such plaintiffs in part (c), logically carries the negative
implication that no other remedy was intended to be conferred on
private plaintiffs.

18 *Id.* at 1083. Interpreting the structure and language of the statute in this manner, and in
19 consideration of its legislative history, the *Wollersheim* Court concluded that “Congress provided
20 precisely the remedies it considered appropriate” for private plaintiffs: treble monetary damages
21 for harm to business and property, costs, and attorneys’ fees. *Id.*; *see also Oscar*, 965 F.2d at 786
22 (noting that civil RICO provides only for treble damages for harm to business and property, not
23 even monetary recovery for personal injuries); *Natomas Gardens Inv. Grp., LLC v. Sinadinis*, 710
24 F. Supp. 2d 1008, 1018 (E.D. Cal. 2010) (in the context of whether certain individuals are
25 necessary parties to a civil RICO action, noting that there is no risk of a judgment requiring the
26 defendant to convey property because “[t]he only remedy for a civil RICO violation brought by an
27 individual . . . is treble damages, costs, and attorneys’ fees”).

28 The Ninth Circuit has not yet ruled on the availability of declaratory relief for civil RICO

plaintiffs. Tellingly, Plaintiff concedes that it cannot cite a single case within the Ninth Circuit that has granted such relief. To hold that a private plaintiff can obtain declaratory relief, however, would require rejection of the reasoning of *Wollersheim*. Indeed, no court to address *Wollersheim* in the context of a private RICO plaintiff's request for declaratory relief has distinguished the case. *See, e.g., Aarona v. Unity House, Inc.*, CV No. 05-00197 DAE/BMK, 2007 WL 1963701, at *16-17 (D. Haw. July 2, 2007); *Natomas Gardens Inv. Grp.*, 710 F. Supp. 2d at 1018 (to the extent that a judgment regarding the parties' rights to property can be viewed as declaratory relief, relying on *Wollersheim* to find such relief unavailable); *Westways World Travel, Inc. v. AMR Grp.*, 218 F.R.D. 223, 242 (C.D. Cal. 2003) (in the context of a motion for class certification, not citing *Wollersheim* at all, and noting that while injunctive relief is unavailable, "there is no legal barrier to obtaining a declaratory relief under the statute").

To the contrary, the only district court to engage in an in depth discussion of *Wollersheim*'s reasoning for barring injunctive relief has found that it compels the conclusion that declaratory relief is likewise unavailable to a private RICO plaintiff. *See Aarona*, 2007 WL 1963701, at *17. In *Aarona*, the plaintiff-shareholders brought suit against a corporation and several of its board members, alleging that they had mismanaged the company's financial affairs, made improper distributions, engaged in self-dealing, and converted the company's assets. *Id.* at *1. At the core of the claims was the allegation that one of the individual defendants had unlawfully exercised all of his voting proxies to convert the company to a nonprofit corporation without members, essentially divesting the plaintiffs of membership in the corporation. *Id.* Among the causes of action alleged was a civil RICO claim for which the plaintiffs sought declaratory relief—specifically, an order invalidating the proxy vote, declaring existing Unity House proxies invalid, and restoring membership rights of former members. *Id.* at 16. The district court concluded that, given *Wollersheim*'s statutory analysis, "it is unlikely that declaratory relief would be allowed" for three reasons:

First, if Congress wanted to allow declaratory relief by private parties, it could have set forth such remedy in the elaborate remedial scheme provided in the RICO statute. Second, Plaintiff may seek the same relief under State law or through other claims. Finally, Plaintiffs are essentially asking this Court to take mandatory

injunction type actions (e.g., invalidate proxies, invalidate a vote of corporate status change, and then restore members to the corporation), actions which are clearly prohibited under Ninth Circuit law.

Id. at *17. The court therefore dismissed the plaintiff's civil RICO cause of action for failure to state a claim.

The Court concurs with the *Aarona* court's analysis in all respects. First, the statutory interpretation in *Wollersheim* reflects the Ninth Circuit's conclusion that the only relief available to private RICO plaintiffs are the specifically enumerated remedies outlined in Section 1964(c), and declaratory relief is not among them. *See Wollersheim*, 796 F.2d at 1088; *see also* 18 U.S.C. § 1964(c). Second, as in *Aarona*, Plaintiff may seek the same declaratory relief it seeks in the civil RICO case under State law; that is, Plaintiff seeks a declaration that Defendant is in breach of the lease, and the ultimate relief sought is eviction of Defendant and return of the property to the Plaintiff, all of which are available through state-law means. Lastly, also as in *Aarona*, while Plaintiff frames the relief sought as purely declaratory in nature, it has injunctive undertones: Plaintiff seeks not just a declaration as to the parties' relative rights to the Premises, but rather a declaration *restoring possession* of the Premises to Plaintiff, which is plainly the type of injunctive relief that *Wollersheim* bars. The Court finds no reason to depart from this thorough and reasoned analysis reading *Wollersheim* to prohibit declaratory relief. By contrast, the only district court within the Ninth Circuit that has found declaratory relief available to private RICO plaintiffs—which did so in the context of class certification—did not address how such relief squares with the reasoning in *Wollersheim*; in fact, it did not cite to *Wollersheim* at all. *See Westways World Travel, Inc. v. AMR Grp.*, 218 F.R.D. 223, 242 (C.D. Cal. 2003) (in the context of class certification, noting that “injunctive relief is not available” but “there is no legal barrier to obtaining a declaratory relief under the statute”) (citation omitted). In short, the Court agrees with *Aarona* that the reasoning in *Wollersheim* renders declaratory relief unavailable to Plaintiff under the circumstances presented here.

Plaintiff's arguments to the contrary are unavailing. Plaintiff first urges the Court to reject *Wollersheim* because it is 30 years old and another court of appeals has more recently allowed injunctive relief. The Seventh Circuit is the only other court of appeals to have addressed this

question directly, and it has held contrary to the Ninth Circuit that RICO does allow private plaintiffs to seek injunctive relief. *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 700 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003).³ Most other courts of appeals to address the question in dicta have implied that injunctive relief is unavailable. *Compare Bolin v. Sears Roebuck & Co.*, 231 F.2d 970, 977 n.42 (5th Cir. 2000), *Johnson v. Collins Ent'mt*, 199 F.3d 710, 726 (4th Cir. 1999), and *Sedima*, 741 F.2d at 489 n.20 (expressing doubt about the availability of injunctive relief for private plaintiffs), with *Bennett v. Berg*, 710 F.2d 1361, 1366 (8th Cir. 1983) (McMillan, J., concurring) (suggesting injunctive relief available). But in any event, *Wollersheim* remains good law in the Ninth Circuit, and the Court is bound to follow it and its reasoning. Plaintiff's next argument—that declaratory relief is inherently different from injunctive relief, so even if *Wollersheim* is good law, it does not extend to a request for declaratory relief—fares no better. Putting aside the fact that the declaration Plaintiff seeks sounds in injunctive relief, for the reasons set forth above, while *Wollersheim* itself does not hold that declaratory relief is unavailable, its reasoning compels that conclusion.

Plaintiff also argued that declaratory relief is nevertheless available under a separate statute, the Declaratory Judgment Act, 28 U.S.C. § 2201. The Declaratory Judgment Act “provides that ‘any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.’” *Countrywide Home Loans, Inc. v. Mortg. Guar. Ins. Corp.*, 642 F.3d 849, 852 (9th Cir. 2011). But “[a] declaratory judgment is not a theory of recovery.” *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1111 (E.D. Cal. 2014) (quoting *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764, 775 (1st Cir. 1994)). Thus, its remedy is unavailable where the plaintiff has not pleaded a cognizable claim in the first instance. *See id.* And, unsurprisingly, Defendant is unable to cite a single case in which the Court granted solely declaratory relief to a private plaintiff pursuant to the Declaratory Judgment Act on a civil

³ On review, the Supreme Court expressly declined to address whether declaratory relief is available to a private plaintiff in a civil RICO action. *See Scheidler v. Nat'l Org. of Women*, 537 U.S. 393, 411 (2003).

1 RICO claim. Thus, Plaintiff's reliance on the Declaratory Judgment Act does not save its RICO
2 claim.

3 Because the requested relief is unavailable, Plaintiff fails to state a cognizable claim for
4 relief under the civil RICO statute. Thus, the RICO claim must be dismissed for this additional
5 reason. Further, because Plaintiff may not obtain declaratory relief based on a violation of the
6 RICO statute, the second claim for declaratory relief must also be dismissed.

7 CONCLUSION

8 For the reasons discussed above, the Court GRANTS Defendant's motion to dismiss the
9 FAC. Plaintiff shall have leave to amend to cure the deficiencies described above. Plaintiff is
10 cautioned, however, that such amendments should only be made if Plaintiff can make such
11 allegations in good faith and consistent with Federal Rule of Civil Procedure 11. Plaintiff shall
12 file a Second Amended Complaint ("SAC") by September 10, 2015. Failure to file an SAC may
13 result in dismissal of the claims with prejudice.

14 This Order disposes of Docket No. 13. The Court continues the case management
15 conference to November 19, 2015 at 1:30 p.m.

16 **IT IS SO ORDERED.**

17 Dated: August 20, 2015

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20 JACQUELINE SCOTT CORLEY
21 United States Magistrate Judge
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